tract can defeat legitimate governmental authority; *People ex rel. Ry. Co.* v. *Pub. Serv. Com.*, 183 N. Y. S. 473, involving a rate in city limits for a railroad which was not a street railway.

Emergency increases in rates are justified in some cases in these troublous after-war times. *La Crosse* v *Railroad Com.* (Wis., 1920), 178 N. W. 867. The general discontent aroused by raising of rates by commissions has led some legislatures to withhold from commissions power over rates fixed by contract with a municipality. MICHIGAN ACTS 1919, 753; *Mobile v. Mobile Electric Co.* (Ala., 1920), 84 So. 816; *Richmond* v. *C. & P. Tel. Co.* (Va., 1920), 105 S. E. 127, though in New York the restriction is limited to franchises and contracts subsisting when the amendment to the act was passed. *New York City* v. *Nixon* (N. Y., 1920), 128 N. E. 245; *Niagara Falls* v. *Pub. Serv. Com., ib.* 247; *People ex rel. Garrison* v. *Nixon, ib.* 255. In most cases there is no such limitation on the power of the commission to increase rates. *Pub. Serv. Com.* v. *Girton* (Ind., 1920), 128 N. E. 690; *Hoyne* v. *Chicago & O. P. E. Co.* (Ill., 1920), 128 N. E. 587. A so-called Home Rule Charter provision in the constitution does not prevent legislative control of rates. *Detroit* v. *Mich. R. Com.* (Mich., 1920), 177 N. W. 306. This power of commissions over rates has recently been exercised more often in cases where the contracting parties were the company and the municipality, but it is equally applicable to rates fixed in a contract between a public utility and an individual. *Rutland R. L. & P. Co.* v. *Burditt Bros.* (Vt., 1920), 111 Atl. 582, citing, among others, the leading case of *Union Dry Goods Co.* v. *Ga. Pub. Serv. Corp.*, 142 S. E. 841, aff., 248 U. S. 372; *Pub. Utilities Com.* v. *Wichita R. & L. Co.*, 268 Fed. 37 (Kan., 1920); *Ohio & Colorado, etc., Co.* v. *Public Utilities Com.* (Colo., 1920), 187 Pac. 1082. E. C. G.

RIGHT OF TORT FEASOR TO INDEMNITY AND EXONERATION.—In cases where a municipality has been called upon to respond in damages because of its legal duty to keep sidewalks free from obstructions, but where the obstruction was caused by the negligence of a third person, it is clearly established by a long line of decisions that the municipality may recover against the person whose negligence was the real cause of the injury. See a review of the cases in note in L. R. A. 1916 F. 86.

These indemnity actions seem to be in the nature of quasi contractual actions, and the theory upon which they are based is much the same as that in the cases where a surety is allowed contribution from his co-sureties. That this right of contribution in suretyship cases is not based upon any true contractual relationship, either express or implied, is clearly shown by the case of *Deering* v. *Winchelsea*, 2 B. & P. 270, where it was held that the right of contribution among sureties exists even in cases where the obligations of the several sureties are evidenced by separate bonds, as well as where they are bound in the same instrument. And in *Norton* v. *Coons*, 6 N. Y. 33, it was held that the right to have contribution exists, though the sureties became such at different times and without each other's knowledge.

In the cases where a municipality brings an indemnity action against a negligent landowner, the courts do not state very clearly what the theory of

the action is, some of them going so far as to say that it is immaterial what theory the action is based upon. But it seems clearly to be quasi contractual in its nature. The quasi contract is based upon the concurrent liability of the city and the landowner. The injured party may sue the landowner whose negligence was responsible for the injury, he may join the city as a co-defendant, or he may sue the city alone, and in any event there will be a recovery. But the landowner is primarily liable, since it was his negligence which caused the injury. When the city is compelled to respond in damages to the injured party, the landowner is thereby released from the tort liability, and to that extent has been enriched at the expense of the city. This enrichment creates a duty binding upon him to indemnify the city for anything it has had to pay out because of his negligence. And this duty is clearly of a quasi contractual nature. See WOODWARD ON QUASI CONTRACTS, Section 258.

An entirely different, and somewhat novel, situation was presented in a recent Missouri decision. *City of Springfield* v. *Clement* (Aug., 1920), 225 S. W. 120. In that case a landowner had negligently permitted water spouts on his building to remain in leaky condition, so as to cause a formation of ice on the sidewalk, resulting in the injury of a pedestrian. The injured party sued the city and recovered. Before that suit was brought, however, the owner of the building died, and his estate was fully administered. After judgment had been recovered by the injured party against the city, this indemnity action was brought against the heirs of the landowner, their liability being predicated upon assets devised to them by the decedent. In allowing a recovery the court said: "We do not think it material as to a scientific classification of the plaintiff's cause of action. It is sufficient to know that the relationship between this plaintiff and Milligan to Miss Abbott's cause of action and to each other was and is such that the plaintiff is entitled to recover indemnity for having to pay the Abbott judgment. It is not material whether such relationship was brought about by an express contract, an implied contract, or an obligation imposed by law."

Although this decision reached a just result, it is difficult to find a logical justification for it. The court distinctly said that it was immaterial what the theory of the action was, but such a position seems untenable. It might, indeed, be very material in some cases to determine what theory the action is based upon. The action unquestionably does not sound in tort, although that was contended for by the defendants. If it did, it is conceded that the action could not survive the death of the landowner. But there is also a distinct difficulty in establishing a quasi contractual relationship such as we have in the ordinary indemnity suit. For here the landowner was released from his tort liability, not by the payment of the judgment by the city, but by his death, which occurred before the action had been brought against the city. It is difficult to make out a duty of the landowner to the city at the time of his death. And yet, unless there was some duty resting upon him before his death, this decision cannot be justified on any logical basis. It would be merely a peremptory decision in favor of the city. But is it not possible to establish such a duty by relating it back to the original negligent acts, or omission to act, of the landowner? This, indeed, seems

to be the only logical solution of the difficulty. On such a theory the owner of the building, by his negligence, comes immediately under a duty to exonerate the city, to save the city harmless. This duty will survive his death.

While this duty does not seem to fit into any of the more familiar legal categories, either tort, contract, or quasi contract, that fact raises no vital objection. There could be no doubt as to the power of a legislature to impose such a duty. See *City of Rochester* v. *Campbell,* 8 N. Y. Supp. 252. That being so, it is not juridicially impossible to conceive of such a duty based solely upon principles of equity. Such an equitable duty upon the landowner is closely analogous to the equitable duty of a principal to exonerate his surety, a duty which is related to, but distinct from, the duty to reimburse after payment by the surety. See extensive note in L. R. A. 1918 C, 10. See also a very interesting analysis by Mr. Street in his work on the FOUNDATION OF LEGAL LIABILITIES, Vol. 2, page 230. P. W. G.